

No. 75-540

Supreme Court, U. S.
FILED

DEC 8 1975

MICHAEL RUDAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1975

ALICE A. BOYLE AND CARRIE H. BOYLE, PETITIONERS

v.

**THOMAS S. KLEPPE, SECRETARY OF THE
DEPARTMENT OF THE INTERIOR**

**ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

**ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.**

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-540

ALICE A. BOYLE AND CARRIE H. BOYLE, PETITIONERS

v.

THOMAS S. KLEPPE, SECRETARY OF THE
DEPARTMENT OF THE INTERIOR

*ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT*

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

Petitioners contend that the court of appeals erred in sustaining the Secretary of the Interior's determination that there had been no finding of a valuable mineral deposit on their land.

In October, 1964, petitioners filed for patents for two mining claims for decomposed granite in placer formation. In June, 1965, the United States filed adverse proceedings against these placer claims. A hearing was held before an Interior Department examiner, who determined that these claims were invalid. Following intermediate departmental appeals, the Secretary of the Interior remanded the matter for development of fuller and clearer evidence on the competitive local market price of the granite (Pet. App. 15a). The parties stipulated that no further hearings were necessary and submitted experts' reports on this issue.

Upon consideration of the additional evidence, the examiner again concluded that petitioners' claims were invalid (Pet. App. 14a-28a). Reviewing the conflicting evidence, he found that the vari-colored decomposed granite on the claims was a "common variety" of stone, within the meaning of 30 U.S.C. 611, and that the deposit was therefore no longer open to location under the mining laws (Pet. App. 20a). He also found that petitioners' working of the claims in years prior to 1955 did not entitle them to a patent by adverse holding (Pet. App. 20a-22a, 27a-28a). Finally, he held that petitioners had not established a discovery date prior to July 23, 1955 (Pet. App. 27a-28a).

The petitioners sought judicial review of these determinations in the United States District Court for the District of Arizona, which granted summary judgment for them and remanded the matter to the Bureau of Land Management (Pet. App. 10a-13a). The court of appeals reversed and remanded the case to the district court for entry of summary judgment for the Secretary (Pet. App. 7a-9a). It held that there was substantial evidence supporting his conclusion that there had been no discovery of a valuable mineral deposit within petitioners' claims prior to July 23, 1955. It also found that the record supported his finding that the decomposed granite was a "common variety" of stone (Pet. App. 8a).

Petitioners contend (Pet. 7-16) that these findings are not supported by substantial evidence. But whether a deposit meets the test of discovery is a question of fact. *Cameron v. United States*, 252 U.S. 450; *Converse v. Udall*, 399 F. 2d 616, 619 (C.A. 9), certiorari denied, 393 U.S. 1025.¹ Judicial review of the Secretary's determination is confined to the evidence contained in the

¹Petitioners' contention (Pet. 17-21) that their intermittent sales satisfied the marketability test set forth in *United States v. Coleman*, 390 U.S. 599, was properly rejected by the court of appeals on the basis that "[m]ost of [petitioners'] proof consisted of general unsupported claims of sales in unspecified amounts" (Pet. App. 8a).

administrative record, and petitioners were not entitled to a *de novo* hearing in the district court. *Dredge Corp. v. Penny*, 338 F. 2d 456, 462 (C.A. 9), reversed on other grounds after remand, 398 F. 2d 791 (C.A. 9), certiorari denied, 393 U.S. 1066. If supported by substantial evidence, the Secretary's decision is conclusive. *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416; *Henrikson v. Udall*, 350 F. 2d 949 (C.A. 9). Whether the court below properly determined that the administrative findings were supported by substantial evidence is a question that does not warrant further review by this Court.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

DECEMBER 1975.